**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

**JANUS KULPA, M.D. and
MEDICAL CARE CENTER, P.L.L.C.** **PLAINTIFFS**

VERSUS **CIVIL ACTION NO. 1:07CV1136HSO-JMR**

**OM FINANCIAL LIFE INSURANCE COMPANY
f/k/a FIDELITY & GUARANTY LIFE
INSURANCE COMPANY, ET AL.** **DEFENDANTS**

**MEMORANDUM OF AUTHORITIES IN SUPPORT OF
PLAINTIFFS' RESPONSE TO DEFENDANT OM FINANCIAL
LIFE INSURANCE COMPANY'S MOTION TO COMPEL
ARBITRATION OF PLAINTIFFS' CLAIMS**

Plaintiffs Janus Kulpa, M.D. and Medical Care Center, P.L.L.C. ("Plaintiffs") submit this memorandum in support of their Response to Defendant, OM Financial Life Insurance Company's, Motion to Compel Arbitration and would show unto the Court as follows:

BACKGROUND

Plaintiffs filed suit against OM Financial Life Insurance Company, f/k/a Fidelity & Guaranty Life Insurance Company ("OM Financial") and other defendants asserting claims for rescission, negligent misrepresentation, intentional misrepresentation, common-law fraud, aiding and abetting common-law fraud, and civil conspiracy relating to the sale of life insurance policies ostensibly in compliance with Section 412(i) of the Internal Revenue Code. After filing suit, the Defendants filed motions to compel arbitration contending that the claims are all subject to arbitration pursuant to various arbitration agreements.[1] This memorandum sets forth its basis for asserting that these various arbitration agreements should not be enforced.

Defendants, Agilis and Professional Benefit Company d/b/a Professional Business Services' ("PBS") developed a prototype life insurance plan to be marketed to medical practitioners throughout the country, including Plaintiffs. These plans, including the plan that is the subject of this litigation, were being primarily funded through life insurance policies that were not appropriate or legally permissible for such plans. Defendants, Vance Syphers ("Syphers") and Wealth Group, marketed the life insurance plan developed by Agilis and PBS to Plaintiffs and other medical practitioners throughout the United States. Syphers and Wealth Group held themselves out as experts in the fields of wealth creation and wealth protection who could advise medical practitioners on how to protect their personal assets, reduce malpractice costs and tax manage their practices.

On August 1, 2006, Syphers and Wealth Group, while acting as agents for OM Financial Insurance Company, Agilis and PBS approached Kulpa and Medical Care Center, regarding the establishment of one of these wealth protection/tax sheltering plans. More specifically, these Defendants proposed that Medical Care Center establish Toro Holdings, LLC which would be virtually wholly funded through a life insurance policy on the life of Kulpa, ostensibly in compliance with the Internal Revenue Code.

As an inducement to get medical practitioners to set up these plans and as part of their marketing scheme, Syphers and Wealth Preservation Group presented to Plaintiffs two opinion documents on unidentical programs in an effort to mislead Plaintiffs into

[1] The language of the various arbitration agreements at issue have been set forth in the Defendant's pleadings and exhibits thereto. For the sake of brevity, this memorandum does not repeat the language contained within the agreements but addresses Plaintiffs contentions that these agreements are not enforceable.

believing that the plan being marketed to Plaintiffs would survive Internal Revenue Service scrutiny and that the premiums paid to fund the plan would be deductible for federal income tax purposes. These opinions were, upon information and belief, prepared by counsel who had existing and on-going relationships with Agilis and Professional Business Services.

In addition to designing the Kulpa plan, Syphers, Wealth Group, Agilis and PBS, all acting as agents for OM Financial Insurance Company, promoted to Kulpa and Medical Care Center certain amounts and types of insurance that would be required to fund the Kulpa plan. To that end, Defendants recommended that the Kulpa plan be funded with a specific life insurance policy issued by OM Financial Insurance Company. Contrary to OM Financial's assertions in their motion and memorandum, Kulpa was not given the option of purchasing a life insurance policy from a carrier of choice.

Syphers and Wealth Preservation Group, all acting as agents for OM Financial Insurance Company, promised and represented to Kulpa and Medical Care Center that such a plan would provide the following benefits: (a) certain insurance and retirement benefits to Kulpa and Medical Care Center; (b) federal income tax deductions for Kulpa and Medical Care Center related to its insurance premiums paid to OM Financial in connection with the Kulpa plan. Defendants also represented to Plaintiffs that Defendants had special expertise regarding such plans, wealth creation, wealth protection, tax management, insurance policies, and related federal income tax matters.

In reliance upon such promises and representations from Defendants, Kulpa and Medical Care Center established Toros Holdings, LLC and purchased a life insurance policy from OM Financial Insurance Company in order to fund the plan. The relevant policy was No. L0778436 on the life of Kulpa, with the face amount of $7,165,000.00, the Kulpa policy. In addition, Plaintiffs purchased a zero coupon bond. On December 12, 2006, the above referenced life insurance policy was issued to Toros Holdings, LLC as owner. The policy identifies the insured as the Plaintiff, Kulpa.

Syphers and Wealth Preservation Group misrepresented to Plaintiffs that plans, like the Kulpa plan, could be wholly funded through life insurance policies under applicable law, including relevant provisions of the Internal Revenue Code. In reliance upon these misrepresentations, Kulpa and/or Medical Care Center made its premium payments to OM Financial Insurance Company. After purchasing the policy, Plaintiffs learned that the life insurance plan sold to them did not provide the wealth protection and tax benefits they had been led to believe would accrue.

ARGUMENT

A. CLAIMS NOT CLEARLY SUBJECT TO ARBITRATION

Section 2 of the Federal Arbitration Act ("FAA") provides, *inter alia*, as follows:

> A written provision in a . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. A basis at law or in equity that would provide for the revocation of the contract would also preclude the enforcement of the arbitration provision. A court cannot compel arbitration unless it determines that the parties agreed to arbitrate the dispute in question. *Pennzoil Exploration & Prod. Co. v. Ramco Energy, Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998). In other words, if there is a legal theory that would serve as an independent basis to void the existence of the contract or agreement between the parties, arbitration of the dispute is not warranted.

There is a basic two-step inquiry to be undertaken when scrutinizing an agreement under the FAA. *See East Ford, Inc. v. Taylor*, 826 So.2d 709, 713 (Miss. 2002). First, the Court must determine if the parties intended to arbitrate the dispute; if so, the Court must next consider "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *East Ford*, 826 So.2d at 713.

Under the second prong, in order to determine whether external legal constraints exist which would preclude arbitration, courts should generally apply ordinary state-law principles that govern contract formation. *Id.* at 713-14 (*quoting Bank One, N.A. v. Coates*, 125 F.Supp.2d 819, 827 (S.D.Miss.2001)). Thus, only the usual contract defenses "such as fraud, duress, or unconscionability, can be used to invalidate arbitration provisions." *Vicksburg Partners L.P. v. Stephens*, 911 So.2d 507, 514 (Miss. 2005) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)).

In their Complaint, Plaintiffs have alleged that Syphers, acting as an agent for OM Financial Group, Agilis, and PBS, made numerous material misrepresentations to Dr. Kulpa, all in an effort to cause him to enter into the various agreements that are the subject of this litigation. Mississippi recognizes a cause of action for fraudulent inducement and defines it as follows: "Fraudulent in the inducement arises when a party to a contract makes a fraudulent misrepresentation, i.e., by asserting information he knows to be untrue, for the purpose of inducing the innocent party to enter into a contract." *Lacy v. Morrison*, 906 So.2d 126, 129 (Ct. App. Miss. 2004). Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party. *Id*.

In *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, 950 So.2d 170, 177 (Miss. 2007), the Mississippi Supreme Court acknowledged that fraud in the formation of a contract may be considered when called upon to consider whether legal constraints exist external to the agreement which might invalidate arbitration provisions. In *Blakeney*, the Court made the following statement: "We have made it clear in prior cases that, when we are called upon to consider whether legal constraints exist external to the agreement which might invalidate the arbitration provisions, the existence of fraud in the formation of the contract may be considered. *Id*. at 177. The Mississippi Supreme Court went on to note that it had consistently followed the principle that "applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act." *Id*. at FN 9.

The elements for establishing fraud in Mississippi are as follows: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the matter reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. Syphers, while acting as an agent for OM Financial Group, Agilis, and PBS, made multiple misrepresentations to induce Plaintiffs to enter into the various agreements at issue here. These misrepresentations include the following:

a. On or about August 1, 2006, Syphers orally misrepresented to Plaintiffs that (i) the Kulpa plan, including the life insurance policy that would be used to fund it, complied with all federal tax laws and regulations; and (ii) that the type of plan proposed to Kulpa, including the insurance policies that would be used to fund it, had been reviewed by and approved by tax attorneys.

b. On or about August 1, 2006, Syphers orally misrepresented to Plaintiffs that the Kulpa plan, including the insurance policies that would be used to fund it, complied with all federal tax laws and regulations.

c. On or about August 1, 2006, Syphers orally represented to Plaintiffs that the insurance premiums paid to fund the life insurance policy constituted a legally permissible deduction for income tax purposes.

Syphers' assertions induced Plaintiffs to enter into these various agreements and contracts. Plaintiffs would not have entered into these agreements and contracts but for the material misrepresentations made. Due to Plaintiffs factually supported claims of fraud in the inducement, the contracts are entirely voidable at Plaintiffs' election. As such, the arbitration provisions contained within these various documents cannot be enforced.

B. ALTERNATIVELY, THE COURT SHOULD ALLOW LIMITED DISCOVERY PRIOR TO MAKING ITS ARBITRABILITY RULING

Mississippi state courts have long acknowledged that claims alleging misrepresentation and fraud are fact based questions. *Lacy*, 906 So. 2d at 129. Plaintiffs have advised the Defendants and the Court that they believe limited discovery in this matter would be beneficial not only to the determination of arbitrability but also, at some point, to the determination of the underlying issues in this case.

Pursuant to Rule 26(b) of the Federal Rules of Civil Procedure, unless otherwise limited by order of the Court, "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Further, Rule 81 of the Federal Rules of Civil Procedure does not prohibit the use of these rules by the Court prior to rendering an arbitration determination.

Plaintiffs believe that limited discovery amounting to merely two depositions prior to the arbitrability determination will be of great assistance to this Court. Limited discovery would include the deposition of Defendant, Vance Syphers, and 30(b)(6) deposition of Defendant, OM Financial. The depositions are not sought in aid of arbitration but rather in determining the issue of arbitrability. In *Dun Shipping Ltd v. Amerada Hess Shipping Corp*., 234 F.Supp. 291, 294 (S.D. NY 2002), the court noted that discovery may be appropriate as to the question of arbitrability itself.

Plaintiffs seek discovery as to the relationship between Syphers and the other defendants. The actions undertaken by Syphers may have a direct bearing on the arbitrability of this action. Discovery on the issue of arbitrability is proper with respect to a party's motion to compel arbitration, particularly where, as here, the party opposing arbitration alleges a valid defense to arbitration.

> In a Title 9 action to compel arbitration, the discovery provisions of the Federal Rules are applicable. Rule 26 allows discovery only of matters relevant to the controversy, and in a Title 9 action, the issue of arbitrability is a relevant and proper matter for discovery.

MOORE'S FEDERAL PRACTICE (2d ed.) §81.05[7].

In many instances, as here, the question of arbitrability hinges on the resolution of factual disputes, and in such instances, courts permit the parties to conduct discovery, including depositions. *See, e.g. Investor's Capital Corp. v. Brown*, 129 F. Supp.2d 1340, 1341 (M.D. Fla. 2000).

In their Complaint, Plaintiffs have alleged that Syphers, acting as an agent for OM Financial Group, Agilis, and PBS, made numerous material misrepresentations to Dr. Kulpa, all in an effort to cause him to enter into the various agreements that are the subject of this litigation. Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party, and is a valid consideration in determining arbitrability under Mississippi law. Moreover, issues regarding fraud are heavily factual which further supports Plaintiffs request for limited discovery.

CONCLUSION

For all of the reasons set forth herein, Plaintiffs respectfully ask the Court to deny the Motion for Arbitration and alternatively, ask the Court to allow limited discovery on the issue of arbitrability as it is relevant and essential to the Court's arbitrability determination.

Respectfully submitted, this the 6th day of February, 2008.

JAMES KULPA AND
MEDICAL CARE CENTER P.L.L.C.

/S/*BEN F. GALLOWAY*

CERTIFICATE OF SERVICE

I, BEN F. GALLOWAY, of the law firm of Owen, Galloway & Myers, P.L.L.C., do hereby certify that I have this date electronically filed the above and foregoing pleading with the Clerk of the Court using the ECF system which sent notification of such filing to:

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Dated this the 6th day of February, 2008.

/s/*BEN F. GALLOWAY*

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